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**IN THE
COURT OF APPEALS OF INDIANA**

HANI SHUBBAK,

Appellant-Defendant,

vs.

RAYMOND AUGUSTYNIAK,

Appellee-Plaintiff.

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No. 45A04-0611-CV-628

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Jeffrey J. Dywan, Judge
Cause No. 45D11-0512-CT-244

April 4, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Hani Shubbak appeals from the trial court's order granting appellee-plaintiff Raymond Augustyniak's motion to set aside an order dismissing the complaint filed by Augustyniak against Shubbak. In particular, Shubbak raises the following arguments: (1) the trial court erred in setting aside the dismissal pursuant to Trial Rule 60(B)(8), and if it had analyzed Augustyniak's motion pursuant to Trial Rule 60(B)(1), the motion would have been untimely filed; (2) even if Rule 60(B)(8) applies, the trial court erred in finding that the motion was filed within a reasonable time and in finding that Augustyniak has a meritorious claim. Finding that Augustyniak failed to establish a meritorious claim pursuant to Rule 60(B)(8), we reverse the judgment of the trial court.

FACTS

This litigation stems from an auto accident that occurred between Shubbak and Augustyniak on July 20, 2001, in Hammond. On July 10, 2003, Augustyniak filed a complaint against Shubbak, alleging that Augustyniak had sustained injuries and damages resulting from Shubbak's negligence in the operation of his vehicle.

On August 13, 2003, Shubbak served discovery requests on Augustyniak, and after Augustyniak failed to respond to the requests, Shubbak filed a motion to compel on February 20, 2004. Augustyniak did not respond to the motion. The trial court granted the motion to compel on February 26, 2004, but apparently, the order compelling discovery was not served on Augustyniak's attorney. When Augustyniak failed to respond by the court-imposed deadline, Shubbak's attorney sent a letter to Augustyniak's attorney on April 16, 2004,

informing Augustyniak that Shubbak would seek further redress from the trial court if Shubbak had not received the discovery responses by a specified date.

When the specified date passed and no discovery responses had been served, on May 3, 2004, Shubbak filed a motion to dismiss the complaint pursuant to Indiana Trial Rule 37. Augustyniak did not respond to the motion. The trial court granted the motion to dismiss on May 17, 2004, but again, it appears that the order dismissing the complaint was not served on Augustyniak.

Eighteen months later, on November 4, 2005, Augustyniak filed a motion to set aside the dismissal. In support of his motion, Augustyniak asserts that at the time the motion to compel was filed and granted, he was confined in a hospital and unable to respond to Shubbak's discovery requests. Moreover, his whereabouts were unknown to his attorney, with whom he had not kept in touch. Finally, the motion to set aside asserts that Augustyniak's attorney was unaware of the dismissal until he received a letter from Shubbak's attorney on August 11, 2005, informing him that the case had been dismissed. The trial court granted the motion to set aside on October 4, 2006.¹ Among other things, the trial court found as follows:

The discovery motions filed by the defendant were governed by Local Rule 4(A). Under Local Rule 4(A), when the motion to compel and the motion to dismiss were filed by the defendant, the plaintiff had fifteen days after service to file a response. Under Trial Rule 6(E), an additional three days were added because both motions were served by regular mail. Both defense motions were therefore granted before the time allowed for plaintiff to file a response. However, plaintiff has

¹ The delay in the trial court's ruling on the motion to set aside resulted from the transfer of the case to a special judge following the original judge's recusal, a conflict on the trial court's calendar with respect to the original hearing date, and a motion to continue the hearing.

never filed a response to either of the motions and the time for response has long passed.

The defendant submitted separate proposed orders with each of the defense discovery motions. The submission of those orders was governed by Local Rule 3(B) of the Rules of Lake Superior Court. Local Rule 3(B) assists the Clerk in fulfilling the mandate of Trial Rule 72(D). Trial Rule 72(D) requires the Clerk to mail copies of orders to all counsel of record, but the Clerk relies upon the attorney who submits an order to provide the envelopes for mailing. Local Rule 3(B) provides that when proposed orders are submitted, they “shall be accompanied with sufficient copies and stamped, pre-addressed envelopes, so that copies may be mailed to all parties.” Defense counsel’s mailings as to each of those motions does [sic] not appear to have included envelopes for return mailing to opposing counsel. . . . Consequently, neither order appears on record to have been mailed to plaintiff’s counsel.

In the motion to set aside the dismissal, plaintiff’s counsel indicates that he never received the Court’s May 17, 2004[,] order of dismissal. Plaintiff’s counsel indicates in his motion that defense counsel also did not provide plaintiff’s counsel with a copy of the dismissal order and that plaintiff did not learn of the dismissal until after plaintiff’s counsel wrote to defendant’s counsel on August 11, 2005.

Because of the procedural irregularities which exist in this case, the Court finds that the dismissal order entered on May 17, 2004[,] should be set aside. The Court further finds that though the plaintiff’s motion to vacate the dismissal was filed more than one year after the dismissal was entered, that relief from the order of dismissal is appropriate under Trial Rule 60(B)(8). The plaintiff has alleged a meritorious claim in paragraph 17 of his motion to set aside the dismissal as well, and the case should be decided on its merits.

Appellant’s App. p. 11-13 (footnote omitted). Shubbak now appeals.

DISCUSSION AND DECISION

As we consider Shubbak’s argument that the trial court erred in granting Augustyniak’s motion to set aside the dismissal, we observe that the decision to grant a motion under Trial Rule 60(B) is left to the equitable discretion of the trial court. Levin v.

Levin, 645 N.E.2d 601, 604 (Ind. 1994). The burden is on the movant to demonstrate that relief is both necessary and just. Id. In general, an appellant seeking to overturn an order setting aside a dismissal must show that the trial court abused its discretion, which occurs when the trial court’s judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. Id.; see also Weppler v. Stansbury, 694 N.E.2d 1173, 1176 (Ind. Ct. App. 1998). In ruling on a Trial Rule 60(B) motion, the trial court is required to “balance the alleged injustice suffered by the party moving for relief against the interests of the winning party and society in general in the finality of litigation.” Chelovich v. Ruff & Silvian Agency, 551 N.E.2d 890, 892 (Ind. Ct. App. 1990).

Shubbak first argues that the trial court erred in applying Trial Rule 60(B)(8), as opposed to Trial Rule 60(B)(1), to Augustyniak’s motion to set aside the dismissal. Trial Rule 60(B) provides, in pertinent part, as follows:

On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons:

(1) mistake, surprise, or excusable neglect;

(8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4). The motion shall be filed within a reasonable time for reasons (5), (6), (7), and (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), and (4). A movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense. . . .

We will assume for argument's sake that the trial court properly analyzed Augustyniak's claim pursuant to Rule 60(B)(8), as Augustyniak insists. Given that assumption, it is incumbent upon Augustyniak to present a meritorious claim.

A movant seeking relief under Rule 60(B)(8) must show that he has a good and meritorious claim, meaning a claim showing that a different result would be reached if the case were retried on the merits. Ford Motor Co. v. Ammerman, 705 N.E.2d 539, 558 (Ind. Ct. App. 1999). Mere allegations are insufficient to meet this requirement. Bennet v. Andry, 647 N.E.2d 28, 35 (Ind. Ct. App. 1995). The movant must present some admissible evidence that indicates that the judgment would not remain unchanged and that the movant would suffer an injustice if the dismissal were allowed to stand. Id. The evidence may be in the form of an affidavit, testimony, or other evidence obtained through discovery. Ford Motor Co., 705 N.E.2d at 558.

Here, the trial court relied solely upon one paragraph of Augustyniak's unverified motion to set aside the dismissal in concluding that he had presented a meritorious claim. As noted above, however, mere allegations are insufficient, and Augustyniak failed to attach an affidavit or to verify his motion such that we may treat his allegations as testimony or other admissible evidence.

The only "evidence" attached to the motion to set aside is a police report and a medical report from Augustyniak's chiropractor. The police report is inadmissible hearsay. E.g., Duncan v. Duncan, 764 N.E.2d 763, 766-67 (Ind. Ct. App. 2002) (holding that "police reports and records are inadmissible hearsay according to Ind. Evidence Rule 801 and do not

fall into the public records exception to that rule”). The medical report is also inadmissible, inasmuch as Augustyniak failed to lay a foundation for its admission. See Brooks v. Friedman, 769 N.E.2d 696, 701-02 (Ind. Ct. App. 2002) (holding that medical records are admissible only after proper foundational requirements are met). Moreover, the medical report does not, in any way, establish proof of the causation of Augustyniak’s injuries. Thus, Augustyniak has failed to offer any admissible evidence in support of his allegations regarding Shubbak’s alleged negligence. We are compelled, therefore, to conclude that Augustyniak failed to establish a meritorious claim and that the trial court erred in granting his motion to set aside the dismissal.

The judgment of the trial court is reversed.

DARDEN, J., and ROBB, J., concur.